STANLEY ISRAEL
ATTORNEY AT LAW
650 BRUSH AVENUE
BRONX, NY 10465

TEL. (718) 392-1000
FAX. (718) 517-6457

April 24, 2012

Office of the Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington, DC 20570

Federal Express

Re: Rose Fence, Inc.
29-CA-30485
29-CA-30537

Dear Sir:

Enclosed please find eight (8) copies of Answering Brief submitted on behalf of Rose Fence, Inc. in opposition to the Cross Exceptions filed by the General Counsel in the above matters. The undersigned hereby certifies that copies of the same, have this day been sent by Federal Express to Brent Childerhose, Esq., counsel for the General Counsel and to William K. Wolf, Esq. counsel for the Charging Party, at the addresses previously furnished by such counsel in the proceedings below.

If there are any questions with respect to the foregoing, please contact the undersigned immediately.

Very truly yours,

SI/bm

Cc: Brent Childerhose, Esq.
William K. Wolf, Esq.

16030.ltr

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROSE FENCE, INC.

And **Case No. 29-CA-30485**
Case No. 29-CA-30537

LOCAL 553, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

ANSWERING BRIEF OF ROSE FENCE, INC., ("ROSE" OR "RESPONDENT") SUBMITTED IN OPPOSITION TO THE CROSS EXCEPTIONS FILED BY THE GENERAL COUNSEL AS WELL AS GENERAL COUNSEL'S BRIEF IN SUPPORT OF ITS CROSS EXCEPTIONS

INDEX

TABLE OF CASES AND AUTHORITIES

STATEMENT OF THE CASE
THE SOURCE OF THE EVIDENCE

The sole witnesses to testify at the two (2) day hearing were Scott Rosenzweig, the principal of Rose called as witness by the General Counsel and Brian Cinque, a key managerial employee of Rose. Both were fully familiar with the history and business of Rose and the negotiations with the Union. Neither the General Counsel nor the Charging Party presented any witness to question, contradict or rebut any testimony of Messrs Rosenzweig or Cinque. As such, their testimony stands uncontradicted. General Counsel and the Charging Party had access to bargaining unit employees who had been with Rose for many years, if they wished to challenge the Rosenzweig and Cinque testimony, or if they had any doubt as to its accuracy, p. 36.[1] They called no such employees as witnesses.

THE UNCONTRADICTED TESTIMONY AS TO THE NATURE OF THE RESPONDENT'S BUSINESS, INSOFAR AS SUB-CONTRACTING IS CONCERNED.

As to the use of sub-contractors, the testimony of Rosenzweig was clear. Namely, ninety five percent (95%) to ninety eight percent (98%) of Respondent's business is residential fence installation (the balance is largely commercial fence installation), pp. 20, 23, Respondent has used subcontractors as long as it has been in business (30 years) pp. 53,54, commercial, as opposed to residential fence work, has traditionally been performed for Respondent by subcontractors, not employees, pp. 75, 76, 77, 122 and 123, and the greater than normal use of subcontractors in 2010 was not in replacement of bargaining unit personnel, but rather as a result of the need to immediately supplement the bargaining unit complement, a need created by the March 2010 severe snow storm over Long Island, pp. 28, 32, 33, and 77-81.

[1] p. references are to transcript pages.

THE EVIDENCE AS TO THE NEGOTIATIONS, INSOFAR AS SUB-CONTRACTING IS CONCERNED.

The Union was certified as the collective bargaining representative on June 3, 2010. General Counsel Exh. No. 3. The first bargaining session was held on August 3, 2010. There is no evidence of the Union having requested that any session take place before August 3, 2010. At that meeting, the Union presented its proposal in a document entitled UNION'S PROPOSALS, Resp. Ex. No. 2. That document, paragraph 5, did contain a proposed restriction on the right of the Respondent to utilize sub-contractors. The proposed restriction read as follows:

> 5. Work Protection: The Employer shall not contract out or sub-contract to others work in any category unless all employees on the seniority list are fully employed. In the event that the Employer utilizes sub-contractors in violation, all employees on the seniority list who did not work and should have worked on the day or days that such violation occurred, shall be paid for that day or those days.

As to the sub-contracting, at that first meeting, Respondent stated that it can use sub-contractors, had always used subcontractors, and needed sub-contractors, pp. 118, 119. As Mr. Cinque testified:

> Then from thereon out, it was out of there.
> It wasn't even in the drafts anymore, pp. 118,119.

Sometime thereafter, in the course of the face-to-face and E-Mail negotiations, the Union presented revised proposals in a document outlined NEGOTIATIONS DRAFT, Resp. Exh. No. 3. This document was a complete proposed collective bargaining agreement. But, as Mr. Cinque testified, the original sub-contracting proposal contained in Resp. Ex. No. 2 was no longer to be found in Resp. Exh. No. 3. Rather a different work protection clause was included; the proposed limited prohibition against sub-contracting was further restricted to only bargaining

unit work where bargaining unit employees were "qualified to do said work". Successive Union proposed complete collective bargaining agreements:

Union Proposal Draft 2	Resp. Exh. No. 4
Union Proposal Draft 3 4/12	Resp. Exh. No. 5
Union Proposal Draft 4 5/13	Resp. Exh. No. 6; and
Union Proposal Draft 5 6/1	Resp. Exh. No. 8

are essentially the same in all material respects as Resp. Exh. No. 3. As so further modified and so further limited, the Union's sub-contracting Proposal was expressly agreed to by the Respondent, Resp. Exh. No.8.

ARGUMENT

General Counsel's contention that Respondent violated its 8 (a) (5) obligations by having sub-contractors perform work previously performed by bargaining unit personnel, without first bargaining with the Union over those matters (and in the case of such matters after August 3, 2010, the date of the first bargaining session, to either impasse or agreement), is in error for three fundamental reasons. The first is that General Counsel failed to satisfy its burden of proof with respect to the sub-contracting obligations. The second is that the parties have in fact bargained over that matter and the third is that under the circumstances presented in this case, the parties, under existing Board law, were not, in fact, even required to so bargain since the decision to implement the challenged actions of the Respondent had been made by the Respondent before the Respondent became obligated to bargain with the Union.

A. GENERAL COUNSEL FAILED TO SATISFY ITS BURDEN OF PROOF WITH RESPECT TO ALLEGEDY UNLAWFUL SUB-CONTRACTING.

For all the reasons set forth by the ALJ in her Decision, it is manifestly clear that General Counsel failed to satisfy its burden of proof obligations; hoping to convince the ALJ, that merely establishing the existence of sub-contracting, was all that was required to establish an 8(a) (5) violation. The Decision of the ALJ correctly points out that under Mission Foods, 350 NLRB 336 (2007), the General Counsel's burden of proof extends well beyond merely establishing the existence of sub-contracting.

B. THE PARTIES HAVE BARGAINED OVER THE SUBJECT OF THE ALLEGEDLY WRONGFUL 8 (a) (5) SUB-CONTRACTING ACTIONS OF THE RESPONDENT.

As previously stated, the Union in Resp. Exh. No. 3, proposed a limited restriction on sub-contracting, but as a result of bargaining between the Union and the Respondent at the very first negotiating session on August 3, 2010, the limited restriction was further modified and further limited by the Union in all subsequent Union proposals. As so further modified and so further limited, the ALJ correctly found (page 7 of the Decision of the ALJ) the proposal was agreed to by the Respondent, Resp. Exh. No. 8. So much for the failure to bargain over sub-contracting.

In the instant matter, the Union had every opportunity to engage in bargaining with the Respondent over the allegedly violative 8 (a) (5) sub-contracting actions, (or the effects of each of the allegedly violative 8 (a) (5) actions), did so, and came to an agreement with the Respondent. In such a situation, the General Counsel cannot be heard to argue that the implementation by the Respondent of any such actions, without further bargaining with the Union (over implementation or effects) is violative of 8 (a) (5). The ALJ, in addition to determining that the General Counsel had not satisfied its burden of proof, could and should have

also determined that the parties had in fact bargained to an agreement on the sub-contracting issue.

C. EVEN IF ONE WERE TO ASSUME (ARGENDO) THAT RESPONDENT AND THE UNION HAD NOT BARGAINED OVER THE ALLEGEDLY VIOLATIVE SUB-CONTRACTING ACTIONS, OR THAT PRIOR TO AUGUST 3, 2010 THE UNION HAD NOT BEEN GIVEN NOTICE OF THE ALLEGEDLY VIOLATIVE SUB-CONTRACTING ACTIONS, AND HENCE HAD NOT HAD THE OPPORTUNITY TO BARGAIN WITH RESPECT TO THE SAME (OR THE EFFECTS OF THE SAME), THOSE ACTIONS WERE NEVERTHELESS NOT VIOLATIVE OF 8 (a) (5), SINCE THE DECISION TO IMPLEMENT THOSE ACTIONS HAD BEEN MADE BY THE RESPONDENT BEFORE IT BECAME OBLIGATED TO BARGAIN WITH THE UNION.

As we have pointed out on page 4 of this Brief, approximately thirty (30) years ago, at the very inception of the business, Respondent made a decision to sub-contract certain of its operations, commenced so doing so and in furtherance of that decision continued to do so each and every year thereafter, continuing through 2010 and 2011. That decision has been implemented with such regularity and frequency, that employees could and did reasonably expect the decision to be implemented on a regular and consistent basis. The March 2010 storm, dramatically increasing Respondent's volume of business in the 2010 busy season, simply increased the need for utilization of sub-contractors. Clearly the decision to sub–contract certain of its operations, alleged to be violative of 8 (a) (5), was made many, many, years ago; certainly well before the Union appeared on the scene, and certainly well before the Respondent became obligated to bargain with the Union (whether that date be May 21, 2010, the date of the election, June 3, 2010, the date of certification, or August 3, 2010, the date of the first negotiating session, or some date between those dates).

In Starcraft Aerospace, Inc., 346 NLRB 1228 (2006). The Board stated as follows at p. 1230:

> "We find the Respondent did not violate Section 8 (a) (5) and (1) of the Act by laying off the unit employees. In general, an employer violates Section 8 (a) (5) and (1) by unilaterally implementing changes in the terms and conditions of employment of its represented employees without satisfying its bargaining obligation. If, however, an employer makes a decision to implement a change before being obligated to bargain with the union, the employer "does not violate Section 8 (a) (5) by its later implementation of that change". SGS Control Services, 334 NLRB 858, 861 (2001); accord: Consolidated Printers Inc., 305 NLRB 1061 fn. 2, 1067 (1992). Emphasis supplied

The above is the law; the cited cases have not been reversed or overruled, or in any way rendered inapplicable.

Indeed Starcraft Aerospace, Inc., did not announce any new proposition of law; rather it reaffirmed existing law. As pointed out, it cited the earlier cases of SGS Control Services and Consolidated Printers Inc. These two earlier cases also made clear that the date of a decision (made prior to the creation of the bargaining obligation) need not be established with precision. As we have pointed out, the decision to sub-contract, here challenged as being violative of 8 (a) (5), was made many, many years ago and implemented year after year after year. This suffices for the purpose of Starcraft Aerospace, Inc. A more precise date of the initial decisions is not required:

> As set forth in Consolidated Printing, supra, it is not essential that the precise date of the decision be established, 305 NLRB at 1061 fn.2. The critical fact is whether the employer's decision predated the election. SGS Control Services, p861,fn..3.

As we have set forth herein, Respondent has not merely engaged in a "prior practice", but rather made a decision with respect to sub-contracting and how it was to be handled on a go forward basis; and has at all times thereafter adhered to that original decision. The Respondent is not relying in this proceeding, nor acting on, merely a past practice. Thus the cases cited by the General Counsel to establish the principal that "past practice" is not a cognizable defense to an 8 (a) (5) allegation of failure to bargain over sub-contracting have no relevance, so long as Starcraft, Consolidated Printers and SGS Control Services remain Board law. Starcraft, Consolidated Printers and SGS Control Services, remain as vital and controlling Board precedents, fully consistent with the case cited by General Counsel, in its brief in support of its Cross Exceptions, Mission Food, 350 NLRB 336 (2007), Porta King Building Systems, 310 NLRB 539, (1993), Eugene Iovine, Inc, 328 NLRB 294 (1999), Citizens Publishing, 331 NLRB 1622 (2000), and Overnite Transportation Company, 330 NLRB 1275 (2000). That fact is made crystal clear by both the date of the Mission decision, as well as the composition of the Board rendering the Mission decision. Mission, clearly the principal case cited by the General Counsel, was decided in 2007, by a unanimous panel, consisting of members Battista, Schaumber and Walsh. The Starcraft panel a year earlier, also included members Battista and Schaumber. Mission did not overrule or limit the Starcraft decision. Thus, Mission, as well as the remaining cases cited by the General Counsel remain subject to the principles set forth in the Starcraft decision. The ALJ, in addition to determining that the General Counsel had not satisfied its burden of proof, could/should have additionally determined that even if the burden of proof had been satisfied, the sub-contracting actions of Respondent, alleged to be violative of 8(a) (5), were in fact not violative, since the decision to implement the sub-contracting actions had been made by the Respondent before it became obligated to bargain with the Union. Nor (as we have

already pointed out in our Brief in support of the Respondent's Exceptions) is there the slightest intimation in Starcraft, that the decisions being referred to therein, need be immediate "one time" decisions. Indeed, as set forth on page 13 of such Brief, SGS Control Services hold to the contrary.

CONCLUSION

For all of the reasons set forth herein, the Respondent respectfully requests that the Cross Exceptions filed by the General Counsel, be rejected by the Board and the Decision of the ALJ with respect to sub-contracting be adopted by the Board for all of the reasons set forth by the ALJ in her Decision (as well as the additional reasons set forth herein).

Dated: April 23 , 2012

Stanley Israel, Esq.
Attorney for the Respondent,
Rose Fence, Inc.
650 Brush Avenue
Bronx, New York 10465
718-517-6400